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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 899.

STATE OF OHIO, *ex rel.*, SIBARCO CORPORATION, WALTER E. MISCHNICK,

Petitioners,

vs.

THE CITY OF BEREA, ALBERT M. McDONALD, Building Commissioner of the City of Berea,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTIONS PRESENTED.

I.

Should the decision of the Supreme Court of Ohio defining the scope of appellate mandamus jurisdiction under the Ohio Constitution be set aside in order to decide whether the facts in the record warrant striking down a municipal zoning ordinance as applied to petitioners' corner parcel?

II.

Where there is no evidence in the record showing that the land on which petitioners desire to construct a gasoline service station is not being productively used for the purposes for which it is zoned in a manner consistent with the use of all property in the same block, is it beyond fair debate that such zoning ordinance as applied deprives petitioners of rights guaranteed by the Fourteenth Amendment?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent provisions of the Federal and Ohio Constitutions are set forth in the Appendix of the Petition, at pp. 27-28. The provisions of Chapter 2506 of the Ohio Revised Code are set forth in the Appendix to this Brief, at pp. 10-12.

STATEMENT.

This case involves a corner parcel embracing two lots in the City of Berea, Ohio on which petitioner Sibarco Corporation desires to construct a gasoline service station. The applicable municipal zoning ordinance (amended and effective since 1952) authorizes this land to be used for only residential purposes (single family dwelling, apartment and hotel uses). On the corner lot, owned by petitioner Mischnick, stands an attractive two and one-half story Victorian house containing six apartments. The adjacent lot is improved with a one and one-half story frame single family dwelling. As of 1962, no uses except residential uses existed in the entire block of which the Mischnick property forms the southern tip. There is no evidence in the record to indicate that this situation has changed.

On September 3, 1964, petitioner Sibarco Corporation applied for a permit to erect a gasoline service station on the property mentioned above. Following the clear mandate of the comprehensive zoning ordinance, respondent McDonald, the Building Commissioner of the City of Berea, denied the application. Petitioners took an appeal to the Board of Zoning Appeals of the City, which affirmed the Commissioner's decision and denied the permit on September 21, 1964.

At this point, petitioners could have taken an appeal to the trial courts of the State of Ohio pursuant to the provisions of Chapter 2506 of the Ohio Revised Code. (Appendix herein, at pp. 10-12.) That statute provided petitioners with an adequate opportunity to present all constitutional objections and to have a full judicial review if petitioners were dissatisfied with the decision of the Court of Common Pleas. Instead, petitioners chose to omit the trial court level and to file the within action for a writ of mandamus in the Court of Appeals for the Eighth Judicial District of Ohio. In their mandamus petition, no facts were set forth indicating why petitioners' statutory right of appeal to the Court of Common Pleas from the final decision of the Board of Zoning Appeals would not provide them with an adequate remedy if, as they claim, the zoning ordinance was unconstitutional as applied. To point out this defect, respondents demurred to the petition. The demurrer was overruled. Without any evidence showing why the extraordinary remedy of mandamus was justified in this case, the Court of Appeals granted the writ. Contrary to petitioners' statement to this Court (Petition, at p. 7), the Court of Appeals did not specify the legal grounds for its conclusion. (See Opinion of the Court of Appeals, Appendix of the Petition, at pp. 13-15.) On appeal, the Supreme Court of Ohio reversed, holding that the extraordinary remedy of mandamus was not available in this case absent a showing why the statutory appeal route would fail to provide petitioners a plain and adequate remedy in the ordinary course of the law.

In the statement of petitioners' Question I (Petition, at p. 3) the impression may be conveyed that respondents have admitted that petitioners' property is unconstitutionally zoned. Throughout these proceedings, respondents have vigorously maintained that the comprehensive zon-

ing ordinance of the City of Berea as applied to petitioners' property is a valid exercise of the police power of the City of Berea.

ARGUMENT.

The decision below does not purport to decide any federal question. It does not even express a view on the subject. In order to overcome this apparently insurmountable barrier to review, petitioners thus have had to assert that the purported basis for the decision below was an "evasion" of paramount federal obligations.

However verbalized, the decisions of this Court make clear that before a state judgment on state grounds is cast aside, it must appear that a clear and important federal right has been finally defeated under the name of a local law which serves no legitimate state interest. *Henry v. Mississippi,* 379 U. S. 443, 447. Deciding whether certiorari is appropriate in this case, therefore, requires consideration of whether the federal right claimed below is clear and substantial, whether it has been finally foreclosed, and whether the ground for the decision below serves no legitimate state interest.

I.

There Is No Federal Claim of Substance Involved Here.

The federal right claimed by petitioners in the courts of Ohio was the right to build and use a gasoline service station on a corner parcel located in a block zoned for primarily residential uses. Petitioners asserted that it was the Fourteenth Amendment of the Federal Constitution which invalidated the comprehensive municipal zoning ordinance as applied to their property. How clear and important is this federal claim?

As this Court observed in *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388:

> "Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality * * *. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

Petitioners necessarily are asking this Court to review evidence in order to come to a constitutional pronouncement affecting one parcel of land. But as Mr. Justice Holmes said in *United States v. Johnston*, 268 U. S. 220, 227:

> "We do not grant a certiorari to review evidence and discuss specific facts."

Moreover, as Mr. Justice Douglas observed in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 488:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia v. New York*, 291 U. S. 502; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen v. Nebraska*, 313 U. S. 236; *Lincoln Union v. Northwestern Co.*, 335 U. S. 525; *Daniel v. Family Ins. Co.*, 336 U. S. 220; *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421. We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U. S. 113, 134, 'For protection against abuses by legislatures

the people must resort to the polls, not to the courts.' "

Petitioners seek the decision of this Court in an area which no longer requires constitutional delineation on a question of special interest to petitioners alone. In short, petitioners' claim simply does not involve a federal question of substance.

II.

Petitioners' Federal Claims Have Not Been Foreclosed.

Petitioners suggest that the decision below was inconsistent with previous decisions of the Ohio Supreme Court on the availability of mandamus, and that as a result, petitioners have been left without a forum in which to assert their federal claims. This contention is without foundation.

It is unnecessary for respondents to demonstrate that as of September 21, 1964, the date of the final decision of the Board of Zoning Appeals of the City of Berea denying petitioners the building permit applied for, petitioners should have anticipated that if they failed to take the plain and adequate appeal provided them in the ordinary course of law by the statute enacted for that purpose in 1957, they might well find themselves barred from the extraordinary remedy of mandamus.[1] Such a showing is

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[1] There is substantial support for the proposition that petitioners should have anticipated the ruling below. See, for example, the 1962 decision in *Shaker Coventry Corp. v. Shaker Heights Board of Zoning Appeals,* 115 Ohio App. 472, motion to certify overruled July 5, 1962, appeal dismissed 173 Ohio State 572 (1962):

> "Thus, it will be noted that the latest decisions by the Courts of Appeals and by the Supreme Court are to the effect that the proper remedy to test the validity of zoning ordinances and for a judicial review of the final orders of

unnecessary because petitioners have not been deprived of another opportunity to assert the same constitutional rights which they press here.

Unlike the situation presented in *Angel v. Bullington*, 330 U. S. 183, the decision below did not hold that all courts of Ohio are without jurisdiction to hear petitioners' claims. Petitioners thus have not received an adjudication on the merits of their claims. The doctrine of *res adjudicata* does not bar them from another opportunity to litigate their federal claims if the proper forum is selected.

Nor has petitioners' time forever run, as was the case in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S. 673 and in *N. A. A. C. P. v. Alabama, ex rel. Patterson*, 357 U. S. 449. While indeed the time for taking a statutory appeal from the September 21, 1964 order of the Berea Board of Zoning Appeals has expired, respondents fail to see why petitioners may not apply for a new building permit to revive their rights of appeal.

It therefore is apparent that the decision below has not foreclosed petitioners' rights to assert their constitutional claims in a proper forum if only petitioners would take the steps to assert such claims.

III.

The State Interest Involved Is Vital.

Prior to 1957, there was no plain and adequate remedy in the ordinary course of law by which an Ohio property owner could challenge the application of zoning ordinances to his land except by way of some extraordinary remedy, such as mandamus. It was to meet this

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(Continued from preceding page)

administrative boards of municipalities is by way of appeal under the procedure provided for in Chapter 2506 of the Revised Code." 115 Ohio App., at p. 476.

need in the increasingly litigated field of zoning that the Ohio General Assembly enacted what now has been codified as Chapter 2506 of the Revised Code. Understandably, it took the Ohio courts some time to recognize the existence of the new remedy, and to appreciate its impact upon the propriety of hearing zoning disputes filed at the appellate level, by way of mandamus. The decision below tied together the well settled rule[2] that mandamus must not be issued when there is available a plain and adequate remedy in the ordinary course of law with full recognition that in the field of zoning disputes, Chapter 2506 of the Ohio Revised Code constituted a plain and adequate remedy at law.

But it is not merely the academic "correctness" of the decision below which recommends it. The decision of the Supreme Court of Ohio in this case serves the sound policy of requiring constitutional attacks on zoning ordinances as applied to particular parcels, necessarily calling for careful fact finding and fact weighing, be left to those courts most accustomed to hearing, finding and weighing facts—the trial courts. If further judicial review is required in such a case, it is made available according to ordinary appellate procedures. Zoning disputes are thus placed into the normal judicial channels, where the various levels of courts are each called upon to perform that which they are expert in performing. The right of the Supreme Court of Ohio to exercise this power over its own judicial system serves not a mere "legitimate" state interest, it is a vital state interest.

As this Court observed in *John v. Paullin*, 231 U. S. 583, 585:

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[2] See, for example, *In Re Delgado*, 140 U. S. 586, 590 and *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 383.

"Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Also see: *Hammerstein v. Superior Court of California*, 341 U. S. 491; *Mellon Company v. McCafferty*, 239 U. S. 134.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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February 16, 1967.

APPENDIX.

§ 2506.01 Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

§ 2506.02 Filing of transcript.

Within thirty days after filing the notice of appeal, the officer or body from which the appeal is taken shall, upon the filing of a praecipe, prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony and evidence offered, heard and taken into consideration in issuing the order appealed from. The costs of such transcript shall be taxed as a part of the costs of the appeal.

§ 2506.03 Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from; [,] in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

§ 2506.04 Finding and order of court.

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code.